A

LIANG WENG HENG

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
MOHTARUDIN BAKI JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: P-05-80-03-2012]

C

24 DECEMBER 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Prima facie case - Whether established - Admissibility of confession statement - Evidence Act 1950, s. 27 - Scope of - Whether*

D

information must be tested for voluntariness to result in conviction- Whether s. 27 Evidence Act 1950 can be used to justify police turning an ordinary 'recovery' to 'discovery' - Whether voire dire must be conducted - Evidence Act 1950, s. 17(2) - Whether there was breach of safeguard provided under s. 37A Dangerous Drugs Act 1952 - Whether prosecution

E

exceeded scope of s. 27 Evidence Act 1950 - Whether custody and control of drugs established - Whether there was nexus shown to link appellant to drugs

EVIDENCE: *Information leading to fact discovered - Admissibility of*

F

confession statement - Evidence Act 1950, s. 27 - Scope of - Whether information must be tested for voluntariness to result in conviction - Whether s. 27 Evidence Act 1950 can be used to justify police turning an ordinary 'recovery' to 'discovery' - Applicability of s. 17(2) Evidence Act 1950 - Whether statements of appellant should go through process of voire

G

dire - Whether court should have excluded evidence as highly prejudicial - Whether there was breach of safeguard provided under s. 37A Dangerous Drugs Act 1952 - Whether there was nexus shown to link appellant to drugs

H

The appellant was charged for trafficking in 515.5g of Methamphetamine, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. When the appellant was arrested at Lebuhraya Utara Selatan, no incriminating evidence was recovered. However, in the course of investigation, the prosecution submitted that the appellant admitted to SP5 that he kept

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powdered drugs under a washing machine in a house at Kulim. The police had then taken the appellant to the said house which was grilled and had no occupants. According to the prosecution,

the appellant had turned the washing machine on its side on the floor and took out a black canvas bag containing the drugs. In the High Court, the appellant was found guilty of the offence of trafficking and was convicted and sentenced. The judge had substantially relied on s. 27 of the Evidence Act 1950 ('EA 1950') to impose the death penalty. Hence, this appeal. The issues that arose were (i) whether the evidence adduced and admitted above exceeded the scope of s. 27 of the EA 1950; (ii) whether there was a breach of the confession rules; (iii) whether there was a breach of the safeguard provided under s. 37A of the Dangerous Drugs Act 1952 ('DDA 1952'); (iv) whether there was a breach of the rule of custody and control which were essential elements of trafficking; and (v) whether there was a nexus shown by the prosecution to link the appellant to the drugs.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The foundation of the prosecution case was based on s. 27 of the EA 1950. There was nothing more to show direct nexus to the accused. The Malaysian jurisprudence on s. 27 EA 1950 does not just depend on the admissibility of the 'information' without testing for voluntariness to result in a conviction. The court is entrusted with the duty and responsibility to 'vet' the information which becomes admissible more so when by its own judicial fiat had excluded legislative protection granted to the accused under s. 24 of the EA 1950 and other written laws such as s. 37 DDA 1952. Courts have relied on Indian cases which have made it clear that evidence admitted under s. 27 of the EA 1950 will not amount to confession as inference does not qualify as confession in India. However, under s. 17(2) of the EA 1950, inference amounts to confession in Malaya and Sabah and in consequence, s. 37A of the DDA 1952 comes to the aid of the accused. Section 27 of the EA 1950 is a general provision and s. 37 of the DDA 1952 is a specific provision. (paras 19 & 33)

(2) Section 27 of EA 1950 is not a passport to the admissibility of confession statement. It is only limited to the admissibility of information and subsequent discovery. Section 27 EA 1950 cannot be used to justify the police attempting to turn an ordinary 'recovery' to 'discovery'. Discovery under s. 27 may relate to knowledge but if the purpose of the prosecution by

A the assistance of s. 27 is to show 'culpable knowledge', then s. 17(2) would be attracted and *voire dire* must be conducted. (para 42)

(3) The prosecution in the instant case had exceeded the scope B of s. 27 of the EA 1950. The statements of the appellant to SP5 should have gone through the process of *voire dire*. Even if *voire dire* had not been acted upon, the court should have excluded the evidence as highly prejudicial and excluded the same limited to the discovery only. That was to say 'from the C information given by the accused the drug was recovered' and nothing more to incriminate the accused on the issue of custody and control of the drugs, which were essential elements of trafficking. If not for the confession statements, custody and control of the drugs would not have been D established at the prosecution stage. The appeal must be allowed on the above issues alone. (para 45)

(4) On the issue of break in chain of evidence relating to exhibits and discrepancies in weight and the fact that it was not explained, the appellant had made out a case for acquittal E both at the prosecution as well as at the defence stage (*Zaiful Muhammad v. PP*, refd). The conduct of the prosecution, inclusive of arrest, investigation, recovery, production of exhibits and failure to explain the discrepancies in weight as F complained by the appellant taken as a whole was highly prejudicial to the appellant and impinged on the fairness rule. (paras 36 & 46)

(5) Taking the defence as a whole and contrasting with the prosecution case and evidence, which had in fact no nexus to G the accused, it was difficult to see how a case for trafficking could have been made out by the prosecution at the prosecution stage as well as the defence case (*Mohamad Radhi Yaakob v. PP*, refd; *Ahmad Mukammal Abdul Wahab & Ors v. PP*, refd). This court was of the considered view that it was H unsafe to convict. In consequence, the conviction and sentence was quashed and the appellant was acquitted and discharged. (para 51)

Bahasa Malaysia *Translation Of Headnotes*

I Perayu telah dituduh mengedar 515.5g Methamphetamine, satu kesalahan yang melanggar s. 39B(1)(a) Akta Dadah Berbahaya 1952. Apabila perayu ditangkap di Lebuhraya Utara Selatan, tiada

keterangan yang menunjukkan bahawa perayu bersalah telah dijumpai. Walau bagaimanapun, semasa siasatan dijalankan, pihak pendakwaan menghujahkan bahawa perayu telah mengaku kepada SP5 bahawa dia ada menyimpan serbuk dadah di bawah mesin membasuh baju di sebuah rumah di Kulim. Polis telah membawa perayu ke rumah tersebut yang mempunyai gril dan tiada penghuni. Menurut pihak pendakwaan, perayu telah memusingkan mesin membasuh baju itu ke bahagian tepi atas lantai dan mendedahkan sebuah bag kanvas hitam yang mengandungi dadah berbahaya tersebut. Dalam Mahkamah Tinggi, perayu telah didapati bersalah dan telah disabitkan dan dijatuhkan hukuman. Hakim telah bersandarkan pada s. 27 Akta Keterangan 1950 ('AK 1950') untuk menjatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang timbul adalah (i) sama ada keterangan yang dikemukakan dan diterima telah melebihi skop s. 27 Akta Keterangan 1950; (ii) sama ada terdapat pelanggaran aturan pengakuan salah; (iii) sama ada terdapat pelanggaran pelindung yang disediakan di bawah s. 37A Akta Dadah Berbahaya 1952 ('ADB 1952'); (iv) sama ada terdapat pelanggaran aturan milikan dan kawalan iaitu elemen-elemen penting dalam membuktikan pengedaran; dan (v) sama ada terdapat kewujudan *nexus* yang ditunjukkan oleh pihak pendakwaan untuk menghubungkan perayu kepada dadah-dadah tersebut.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Asas kes pendakwaan berdasarkan s. 27 AK 1950. Tiada apa-apa lagi yang dapat menunjukkan nexus kepada perayu. Jurisprudens Malaysia berkenaan s. 27 AK 1950 bukan hanya bergantung pada kebolehmasukan 'maklumat' tanpa meneliti kesukarelaan untuk membawa kepada satu sabitan. Mahkamah diamanatkan dengan kewajipan dan tanggungjawab untuk 'menyemak' maklumat yang boleh diterimamasuk, lebih-lebih lagi apabila perintah kehakimannya sendiri telah mengecualikan perlindungan peruntukan yang dibenarkan kepada perayu di bawah s. 24 AK 1950 dan undang-undang bertulis lain seperti s. 37 ADB 1952. Mahkamah telah bergantung kepada beberapa kes India yang telah dengan jelasnya menyatakan bahawa keterangan yang diterimamasuk bawah s. 27 AK 1950 tidak akan terjumlah kepada pengakuan kerana inferens tidak layak menjadi pengakuan di India. Walau bagaimanapun, di bawah s. 17(2) AK 1950, inferens terjumlah kepada pengakuan

di Malaya dan Sabah dan akibatnya, s. 37A ADB 1952 membantu perayu. Seksyen 27 AK 1950 adalah peruntukan am dan s. 37 ADB 1952 adalah peruntukan spesifik.

(2) Seksyen 27 Ak 1950 bukanlah pasport kepada kebolehterimaan penyataan pengakuan. Ia hanya terhad kepad kebolehterimaan maklumat dan penemuan berikutnya. Seksyen 27 AK 1950 tidak boleh digunakan untuk mewajarkan pihak polis mencuba menukarkan 'perolehan' biasa kepada 'penemuan'. Penemuan di bawah s. 27 boleh dikaitkan dengan pengetahuan tetapi jika tujuan pihak pendakwaan melalui bantuan s. 27 adalah untuk menunjukkan 'pengetahuan bersalah' maka s. 17(2) akan tertambat dan *voire dire* akan dilaksanakan.

(3) Pihak pendakwaan dalam kes ini telah melebihi skop s. 27 AK 1950. Penyataan perayu kepada SP5 harus melalui proses *voire dire*. Jikapun *voire dire* tidak dilaksanakan, mahkamah sepatutnya mengecualikan keterangan tersebut sebagai sangat memprejudiskan dan mengecualikan yang sama dan menghadkannya kepada penemuan sahaja. Itu adalah untuk menyatakan 'dari maklumat yang diberikan oleh tertuduh dadah itu telah diperolehi' dan bukan menunjukkan bahawa tertuduh bersalah berkenaan isu jagaan dan kawalan dadah tersebut yang merupakan elemen-elemen penting pengedaran. Jika tidak kerana penyataan pengakuan, jagaan dan kawalan dadah tidak dibuktikan pada pihak pendakwaan. Rayuan harus dibenarkan atas isu-isu ini.

(4) Berkenaan isu pemutusan dalam rantaian keterangan berhubungan ekshibit-ekshibit dan percanggahan dadah tersebut berat dan fakta bahawa ia tidak diperjelaskan, perayu telah membuktikan kes pembebasan pada peringkat pendakwaan dan juga pada peringkat pembelaan. (*Zaifull Muhammad v. PP & Another Appeal*, dirujuk). Pengendalian pihak pendakwaan, termasuk penangkapan, penyiasatan, perolehan dan pengeluaran ekshibit-ekshibit dan kegagalan untuk menjelaskan percanggahan dalam berat dadah tersebut seperti yang dihujahkan oleh perayu yang diambil secara keseluruhan adalah amat memprejudiskan kepada perayu dan menjejaskan peraturan keadilan.

(5) Mengambil pembelaan secara keseluruhan dan dengan mengkontraskan dengan kes pendakwaan dan keterangan, yang tidak mempunyai *nexus* kepada perayu, adalah sukar untuk menerima bahawa satu kes pengedaran telah dibuktikan oleh

pihak pendakwaan pada peringkat pendakwaan dan juga pada peringkat pembelaan. (*Mohamad Radhi Yaakob v. PP*, dirujuk; *Ahmad Mukammal Abdul Wahab & Ors v. PP*, refd). Mahkamah ini berpendapat bahawa ia adalah tidak selamat untuk mensabitkan. Oleh itu, sabitan dan hukuman adalah dibatalkan dan perayu adalah dilepaskan dan dibebaskan.

Case(s) referred to:
Ahmad Mukamal Abdul Wahab & Ors v. PP [2013] 4 CLJ 949 CA ***(refd)***
Anandagoda v. Regina [1962] 1 LNS 7 PC ***(refd)***
Athappa Goundan v. Emperor AIR 1937 Mad 618 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Empress v. Babulal (1884) 6 All 509 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Ibrahim v. R [1914] AC 599 ***(refd)***
Kuruma v. The Queen [1955] AC 197 ***(refd)***
Liew Kon Kiow (f) v. PP [1948] 1 LNS 137 CA ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Natcha Dabkaew v. PP (Criminal Appeal No: K-05-177-07-2012) (Unreported)
Ng Yiu Kwok & Ors v. PP [1989] 1 LNS 52 SC ***(refd)***
PP v. Hashim Hanafi [2003] 8 CLJ 555 HC ***(refd)***
PP v. Liew Sam Seong [1981] 1 LNS 159 HC ***(refd)***
PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
PP v. Norzilan Yaacob & Anor [1989] 1 CLJ 466; [1989] 2 CLJ (Rep) 345 HC ***(refd)***
Pakala Narayana Swami v. King-Emperor [1939] 1 LNS 62 PC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Pulukuri Kottaya v. R AIR (1947) PC 67 ***(refd)***
R v. Sang (1980) AC 402 ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
The King v. Cooray [1926] 28 NLR 74 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, s. 37A
Evidence Act 1950, ss. 17(1), (2), 24, 25, 26, 27
Federal Constitution, art. 5(1)

Evidence Act 1872 [Ind], ss. 17, 24, 25, 26, 27

Other source(s) referred to:
Rom, Criminal Ready Referencer, vol 2, p 1220
Sarkar's Law of Evidence, 14th edn, p 367

For the appellants - Shaik Saleem (Izzat Muhtar with him); M/s Shaik Adam & Co
For the respondent - Andi Razalijaya A Dadi; DPP

[Editor's note: For the High Court judgment, please see PP v. Liang Weng Heng [2012] 1 LNS 186.]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal against conviction and sentence of death for trafficking drugs came up for hearing on 17 September 2013 and upon hearing on the same day we allowed the appeal. My learned brothers Azahar bin Mohamed JCA and Mohtarudin bin Baki JCA have read the draft judgment and approved the same. This is our judgment.

Section 27 EA 1950 And Jurisprudence

[2] In the instant case it is not in dispute that the foundation of the prosecution case is based on s. 27 of the Evidence Act 1950 ("EA 1950") and nothing more to show direct nexus to the accused. The learned judge in his 47 pages judgment had dealt with this issue extensively and relied on Malaysian cases which had relied on Indian cases without considering the probative force of the evidence or whether it should be excluded under the 'fairness' rule. Before setting out the charge, facts of the case and submission before us it will be most appropriate to set out the jurisprudence and parameters of s. 27 of the EA 1950 in Malaysia and contrast with the position in India to demonstrate that the Malaysian and the Indian positions on the subject are not one and the same. And reliance on the Indian cases to find culpability in Malaya and Sabah solely on s. 27 of the EA 1950 evidence will be in breach of art. 5(1) of the Federal Constitution which states:

> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[3] Section 27 of the EA 1950 and its equipollent s. 27 of the Indian Evidence Act 1872 is said to be *pari materia*. Being *pari materia* does not necessarily mean courts here can cut and paste the jurisprudence advanced by the Indian courts when other provisions of the Indian Act and Malaysian Act are not one and the same, even though almost all of the sections in India are said to be similar and not necessarily *pari materia* to EA 1950.

[4] The scheme of the Indian Evidence Act ("IA") is that confessions made before police officers are not admissible at all. This is specifically provided for in s. 25 of the IA. Our s. 25 of the EA 1950 is differently worded and allows confessions made to police officers to be admitted if any other written law permits. Further, s. 24 of the EA 1950 makes it clear confession caused by inducement, threat or promise is irrelevant in criminal proceedings. That is to say even though other written law may allow confessions made to police officers to be admissible, but still *voire dire* must be conducted to ensure s. 24 of the EA 1950 is not breached.

[5] In essence s. 24 of the EA 1950 is applicable for confession statement under the Act as well as other written law. In the Malaysian context no written law such as the previous s. 113 of the Criminal Procedure Code ("CPC") or s. 37A of the Dangerous Drugs Act 1952 ("DDA 1952"), etc.; have excluded the operation of s. 24 of the EA 1950, expressly. The protection under s. 24 cannot be done away by judicial *fiat* in consequence of the accused being a protected species pursuant to art. 5 of the Federal Constitution. Further, courts are not allowed to interpret a criminal statute to the prejudice of the accused. Unlike India the law here does not prohibit a confession statement made in police custody inadmissible. It only requires the court to ensure it is voluntary and that can be done by a simple procedure without the need to add to circuitous jurisprudence that too to deprive the accuse of *voire dire*. Refusing *voire dire* when it relates to confession will impinge on the procedural fairness rule guaranteed by the Federal Constitution.

[6] In addition to ss. 24 and 25 restrictions, s. 26 does not allow confession statements to be admitted while the accused was in police custody unless other written law provides, or it is made in the immediate presence of a sessions judge or a Magistrate.

[7] Confession can be divided into two types. One is plenary the other is non-plenary confession. Plenary confession relates to direct acknowledgement of guilt. Non-plenary confession may include inferences or 'information' which are not direct acknowledgement of guilt.

[8] Inference too has specific meaning. In *Anandagoda v. Regina* [1962] 1 LNS 7; [1962] MLJ 289, the Privy Council endorsed the proposition that it is not every statement which suggests any inference as to fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests **not only inference, but the inference that he committed that offence**. The test is objective. (see *The King v. Cooray* [1926] 28 NLR 74). (emphasis added)

[9] The Indian position is that no confession statement by the accused made during police custody is admissible with a small window for permitting 'information' that led to discovery of the incriminating evidence. Even though s. 27 says 'whether the information amounts to confession or not' the Indian decisions are clear on this issue to say that the 'information' will never amount to plenary confession ie, direct acknowledgement of guilt. (see *Pakala Narayana Swami v. King-Emperor* [1939] 1 LNS 62; [1939] 1 MLJ 59).

[10] In Malaysia the Indian position will only apply to Sarawak. That is to say in Sarawak the prosecution cannot establish its case purely in reliance of the 'information' *per se*. For Malaya and Sabah that information whether it is plenary or non-plenary (ie, inference) will amount to confession pursuant to s. 17(2) of the EA 1950. Once it is a plenary confession, s. 24 of the EA 1950 will become operative as of right. If the 'information' does not implicate the accused, then that information will not be caught by s. 17(2) of the EA 1950 and that also will not breach s. 24 of the EA 1950 as it will not amount to confession. In *Liew Kon Kiow (f) v. PP* [1948] 1 LNS 137; [1948] Supp MLJ 150, the Court of Appeal stated that 'suggesting the inference' in s. 17(2) will mean that something short of a full admission of guilt by the accused may yet be a 'confession'. However, any confession statement or what we call as statutory caution statement under any written law can be made admissible provided the strict provision of the written law has been duly complied and that has to be done through a *voire dire* process if the statement is challenged on the ground of voluntariness.

[11] The Indian legislatures and the courts have been consistent in their principles not to admit plenary confession of any kind when given by the accused to the police based on the universal and/or general perception that confession statements may be tainted or concocted.

[12] A cardinal rule of the English law of criminal evidence is that a confession is inadmissible against the accused unless it is voluntary in the sense that it has not been obtained from him by inducement, threat or promise made by a person in authority or by oppression (see *Ibrahim v. R* [1914] AC 599). The rule has been codified in Malaysia by s. 24 of the EA 1950. The rule is further protected by ss. 25 and 26 of the EA 1950, which provide that no confession made to a police officer who is below the rank of an inspector by a person accused of any offence shall be proved against that person; and that no confession made by any person whilst he is in the custody of a police officer shall be proved against that person unless it is made in the immediate presence of a sessions court judge or Magistrate. These statutory provisions clearly go beyond the confession rule in English law. But there is little doubt that, by enacting the wider scope of the rule in Malaysian law, our legislature has afforded greater protection to the accused.

[13] The confession rule is not without reason. The world-famous philosopher Bertrand Russel, in his book *Power*, observed (see *Sarkar's Law of Evidence* (14th edn.) at p. 367):

> The gist of the matter is that a policeman is promoted for action leading to the conviction of a criminal, that the courts accept confession as evidence of guilt, and that, in consequence, it is to the interest of individual officers to torture arrested persons until they confess. This evil exists in all countries in a greater or lesser degree. In India, it is rampant ... . For the taming of the power of the police, one essential is that a confession shall never, in any circumstances, be accepted as evidence.

[14] The sentiments of Betrand Russel was expressed by Justice Mohammood in *Empress v. Babulal* (1884) 6 All 509 in the following words:

> The legislature had in view, the malpractice of the police officers, in extorting confessions and these malpractice went to the length of positive torture, nor do I doubt it as the legislature, in laying down such strongest rules regarding the evidence of police officers as untrustworthy and the object of the rules was to put a stop to

A extortion of confession, by taking away from the police officers the advantage of proving such extorted confessions during the trial of the accused persons.

[15] Legislatures in Malaysia and the courts have placed greater trust in law enforcement agencies to the prejudice of the accused in contrast to the position in England and India. Even though the legislature have placed strict requirement for caution statements to be admitted without expressly excluding s. 24 of the EA 1950, courts here have often ruled that the protection under s. 24 of the EA 1950 or for that matter for caution statement, strictly will not apply to admission of 'information' under s. 27 of the EA 1950, notwithstanding the fact that courts here have also repeatedly warned that s. 27 of the EA 1950 can be abused by law enforcement agencies. In *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, Abdul Hamid Omar LP observed:

> We are not suggesting that the practice by the local police is the same as in India, nevertheless, we are firmly of the view that in invoking s. 27, the Courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

[16] By *fiat* of case laws s. 27 has nothing to do with confession. If the information amounts to confession, s. 24 will be applicable and *voire dire* is necessary to establish voluntariness before it is made admissible. (see *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350: A Classic Display of Judicial Vigilance).

[17] When the 'information' is made admissible does not mean it will have high probative value if there is no sufficient independent evidence to call for the defence. The court has a duty to assess the totality of the evidence at the end of the prosecution case and apply the maximum evaluation test as propounded by *Balachandran v. PP* [2005] 1 CLJ 85. (See *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[18] In addition the court at the end of the prosecution case or defence case must re-evaluate all admitted evidence and must disallow evidence if strict rules of admissibility would operate unfairly against the accused. (see *Kuruma v. The Queen* [1955] AC 197 to be read with maximum evaluation test). The court has also the powers to expunge irrelevant evidence at any stage of the trial. (see *Ng Yiu Kwok & Ors v. PP* [1989] 1 LNS 52; [1989] 3 MLJ 166). In *R v. Sang* (1980) AC 402, the House of Lords asserted that a trial judge in a criminal trial has always a discretion to

refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. Even if the trial court has not considered, the prejudicial effect of the 'information' the Court of Appeal pursuant to s. 60 of the Courts of Judicature Act 1964, is required to re-evaluate the evidence and if the accused had been solely or substantially convicted in consequence of the s. 27 of the EA 1950 evidence the appeal may be allowed on the grounds it may not be safe to convict. (see *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259).

[19] Thus, the Malaysian jurisprudence on s. 27 does not just depend on the admissibility of the 'information' without testing for voluntariness to result in a conviction. The court is entrusted with the duty and responsibility to 'vet' the information which becomes admissible more so when by its own judicial *fiat* had excluded legislative protection granted to the accused under s. 24 of the EA 1950 and other written laws such as s. 37A of the DDA 1952. However, if the trial judge goes through the simple process of *voire dire* in all cases where the 'information' may attract s. 17(2) of the EA and finds it is voluntary, justice will be better served without any allegation of impropriety (see *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350: A Classic Display of Judicial Vigilance).

Section 24 EA 1950

> 24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Section 24 IA

> 24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise 1[having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the

A accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Section 25 EA 1950

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25. (1) **Subject to any express provision contained in any written law**, no confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved as against that person. (emphasis added).

C *Section 25 IA*

25. Confession to police- officer not to be proved.- No confession made to a police- officer 2[, shall be proved as against a person accused of any offence.

D *Section 26 EA 1950*

26. (1) **Subject to any express provision contained in any written law**, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate
E presence of a shall be proved as against that person. (emphasis added).

Section 26 IA

26. Confession by accused while in custody of police not to be
F proved against him.- No confession made by any person whilst he is in the custody of a police- officer, unless it be made in the immediate presence of a Magistrate, 2[shall be proved as against such person. 3[Explanation.-- In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George 4[or elsewhere, unless such
G headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 18825[(10 of 1882)].

[20] It must be noted that the Indian sections and the Malaysian ss. 25 and 26 are not *pari materia* but courts here have rarely
H dealt with the issues when dealing with s. 27 of the EA 1950 and the protection in s. 24 of the EA 1950 or caution statement or s. 17 EA of the 1950, etc.; save for the case of *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350 in a limited sense where Gopal Sri Ram JCA (as he then was) observed:

I

Fifthly, in a number of Indian cases it has been held that the rule permitting admissibility contained in s. 27 is an exception to the prohibition appearing in the two sections that immediately precede it but does not qualify the all pervading qualification enacted in

s. 24: see *Ramkishan Mithanlal Sharma & Ors v. State of Bombay* AIR 1955 SC 104; *Vijay Kumar v. State of Himachal Pradesh* (1978) Crim LJ 1619. The former decision was applied in *Yee Ya Mang v. PP* [1972] 1 MLJ 120. The decisions of the Privy Council in *R v. Ramasamy* [1965] AC 1 at p 13 and of Chang Min Tat J (as he then was) in *Packiam & Anor v. PP* [1972] 1 MLJ 247 appear to support the proposition. Put in another fashion, the principle is that ss. 25 and 26 are subject to s. 27 but all these three sections are governed by and are subject to s. 24. We have no difficulty in affirming the correctness of the proposition as stated in the Indian cases to which we referred a moment ago. Having regard to the language of each of the sections which we have set out and the sequence in which they have been legislatively framed, it is abundantly clear, in our judgment, that in order for a confession or other statement or information to qualify for admission under s. 27, it must have been made voluntarily. A discovery made in consequence of a confession extracted by illegitimate means in the sense described in s. 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the *voir dire*.

[21] Section 27 of the EA 1950, is inextricably interwoven with the word 'admission' and 'confession'. And in consequence s. 17 of the EA 1950 and its Indian equipollent which is not *pari materia* becomes relevant for consideration, as confession statements per se may need to satisfy the test of voluntariness and to achieve that *voire dire* must be conducted. More so when inference by 'information' can amount to confession under s. 17(2) of the EA 1950.

Section 27 EA 1950

27. (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

Section 27 Indian Evidence Act 1872 (IA)

27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

A *Section 17 of EA 1950*

17. (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

B

(2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

(3) Subsection (2) shall have no application in Sarawak.

C *Section 17 in Indian Evidence Act, 1872*

17. Admission define - An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

D

[22] What is visibly clear in the definition of 'Admission' in Malaysia is that the Indian definition is *pari materia* to Sarawak only. For Malaya and Sabah our Act also defines confession. Cases in India will demonstrate that admission and confession are E not one and the same. There is a fine distinction. However, our Malaysian cases do not make any distinction when the legislatures had clearly indicated **two positions in one country**. (emphasis added)

F **[23]** Admissions in reference to criminal law are generally called confessions. Admissions are often described as the 'genus' and confessions is a species of that 'genus'. Thus, all admissions are not confessions, but all confessions are admissions.

G **[24]** In other words, whilst our s. 17(1) of EA 1950 is identical to that of the IA, section 17(2) of EA 1950 is not found in the IA. Until the Privy Council decision in *Pakala Narayana Swami v. King-Emperor* [1939] 1 LNS 62; [1939] MLJ 59, the courts in India relied on Sir James Stephen's definition of confession.

H **[25]** According to Stephen (who was the Law Commissioner in India who drafted the IA), a confession is an admission made at any time by a person charged with a crime, stating or **suggesting the inference** that he committed the crime (emphasis added). Before *Pakala Narayana Swami*'s case, the courts in India accepted I Stephen's definition and allowed statements containing mere admission of incriminating facts as statements containing direct acknowledgement of guilt (see *Athappa Goundan v. Emperor* AIR 1937 Mad 618).

[26] In *Pakala Narayana Swami*, Lord Atkin stated that a confession must *either admit in terms the offence or at any rate substantially all the facts which constitute the offence, but that a mere inference does not qualify as confession* (emphasis added). Applying this definition of confession to s. 27, that part of the information given by the accused as is distinctly related to the fact discovered, if admissible, will never amount to a confession in India. This is particularly so, as in *Pakala Narayana Swami* it was held that an **admission of a gravely incriminating fact, even a conclusively incriminating fact, is not in itself a confession** (emphasis added). However, the position in Malaya and Sabah differs.

[27] In the instant case, the learned judge in his judgment had substantially relied on s. 27 of the EA 1950 to impose the death penalty without also giving much weight to the issue of custody and control that too in a drug trafficking case where there is an added protection to the accused pursuant to s. 37A of the DDA 1952.

[28] After the case of *Pakala Narayana Swami* in India, it is clear the admissibility of the information under s. 27 of the EA 1950 will not amount to confession and in consequence '*voire dire*' to test its voluntariness will not be in issue. The position in Sarawak may be the same. However, for Malaya and Sabah any evidence admitted under s. 27 of the EA 1950 will have to be tested for voluntariness as it may have the effect of confession, and in cases where s. 37A of the DDA 1952 or similar sections are applicable in any offence it must also be tested for voluntariness.

[29] The Federal Court in *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350 had gone to say that *voire dire* is essential when admitting a s. 27 of the EA 1950 information, giving its own reasons without zooming into the difference in wordings of s. 17 of the EA 1950 and IA. Justice Gopal Sri Ram JCA (as he then was) sitting in the Federal Court *inter alia* on the facts of the case had this to say:

> It is beyond question that these statements form the fulcrum upon which the whole case turns. If it is found that these vital pieces of evidence were wrongly admitted and relied upon, then it would follow, as night follows day, that there was no material upon which a conviction on either charge could be properly founded.

A *Md Desa*'s case strictly has not been overruled but generally has not been followed.

[30] In *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507, Chong Siew Fai CJSS (as he then was) introduced a new
B concept to s. 27 of the EA 1950 jurisprudence, what we often term as 'fairness rule' to mitigate the impact of s. 27 of the EA 1950 which rule was not in vogue for s. 27 of the EA 1950 here or in India, at the material time though it was a generally accepted jurisprudence in criminal proceeding. The Federal Court went to
C say that before admitting s. 27 of the EA 1950 statement the court must consider whether or not to admit such information in the interest of justice and fairness taking into consideration the legitimate interest of both the prosecution and the defence. But, the court did not say why a *voire dire* should not be conducted
D as of right when that piece of evidence is material to the prosecution to sustain a conviction.

[31] The Indian courts when dealing with s. 27 was in actual fact dealing with ss. 24, 25 and 26 of the IA which are similar (but
E not *pari material*) to our EA 1950. They did not deal with additional provisions like the previous s. 113 of the CPC statement or s. 37A of the DDA 1952 or its alike. These additional provisions are in fact additional protection to the accused under the confession rule. When these additional provisions become
F applicable, s. 27 of the EA 1950 will in actual fact be made inapplicable by the jurisprudence relating to the legal maxim, *generalibus specialia non-derogant*, and it will also be unconstitutional by virtue of art. 5(1) of the Federal Constitution to rely on Indian cases in the construction of s. 27 of the EA 1950, which has no
G significant relevance as India does not have equivalent provisions such as s. 17(2) of the EA 1950 and s. 37A of the DDA 1952, etc.

[32] The fact still remains that the apex court have not made out the distinction between s. 17 of the EA 1950 and IA and have
H relied on the Indian cases which has no relevance to Malaya and Sabah. Applying the Indian cases and convicting the accused solely based on s. 27 of the EA 1950 information when 'inference' can amount to confession without going through the process of *voire dire* will be in breach of art. 5(1) of the Federal
I Constitution.

[33] Section 27 of the EA 1950 allows evidence of information given by the accused, which is distinctly related to the fact discovered to be admissible. Courts here have in many instances stated that s. 27 of the EA 1950 is an exception to ss. 24 to 26 of the EA 1950 which states that involuntary confessions of an accused in police custody are irrelevant unless made in the immediate presence of a Sessions judge or a Magistrate or words to that. To reach this conclusion, courts have relied on Indian cases which have made it clear that evidence admitted under s. 27 of the EA 1950 will not amount to confession as inference does not qualify as confession in India. However, under s. 17(2) EA 1950 inference amounts to confession in Malaya and Sabah and in consequence, s. 37A of the DDA 1952 comes to the aid of the accused. It must not be forgotten that s. 27 of the EA 1950 is a general provision and s. 37A of the DDA 1952 is a specific provision and the Indian courts were not dealing with a specific provision such as s. 37A of the DDA 1952. The maxim, *generalibus specialia non-derogant* will be applicable to assert that the prosecution must satisfy the elements stated in s. 37A of the DDA 1952 before the information which can amount to confession under s. 17(2) EA 1950 becomes admissible. Section 37A of the DDA 1952 states as follows:

> 37A. (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that no such statement shall be admissible or used as aforesaid:
>
> (a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the

A Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

B (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

C It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence:

D Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

E (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

F (3) Where a statement is purported to be made by a person charged with an offence against this Act under and in accordance with section 113 of the Criminal Procedure Code, the statement so made shall be deemed to have been made under and in accordance with this section.

We will deal with s. 27 of the EA 1950 further in this judgment.

G **Charge**

[34] The accused was charged as follows:

H Bahawa kamu pada 23hb Ogos 2008, jam lebih kurang 6.30 petang, di rumah beralamat No. 9, Lorong Impian Murni 5, Taman Impian Murni, Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah berat 515.5 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya I 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Brief Facts

[35] In the instant case when the accused was arrested at Lebuhraya Utara Selatan on 15 August 2008, no incriminating evidence was recovered. In the course of investigation on the accused on 23 August 2008, the accused had admitted to SP5 that he had kept powdered drugs under a washing machine in a house at Kulim. The police had taken the accused to the said house which was grilled and had no occupants. The learned trial judge had captured that part of the evidence as follows:

> On 23.8.2008, at about 8.00 am, in the course of questioning, the accused admitted to SP 5 that he kept powdered drugs under a washing machine in a certain house at Kulim, Kedah. He did not know the address of the said house. SP 5 reduced his questions and answers given by the accused on a piece of paper, P 60. P 60 reads *inter alia* as follows:
>
> S: Apa yang ingin kamu ceritakan atau beritahu kepada saya?
>
> J: Awal bulan Ogos 2008 saya sama Cindy telah pergi dia rumah di Kulim, Kedah, itu rumah Cindy tidak duduk lagi. Saya pergi naik Vios Cindy.
>
> Saya pergi sana mahu simpan serbuk dadah yang dicuri oleh Jeff dan kawan Rocky dari Stor Polis Depoh, Johor Bahru itu hari.
>
> Itu barang saya simpan dalam 'Washing Machine' di dalam rumah Cindy.
>
> S: Rumah tersebut masih berpenghuni?
>
> J: Tak ada.
>
> S: Rumah tersebut di Kulim, bolehkah kamu beritahu dengan tepat?
>
> J: Saya tidak ingat taman apa tapi boleh tunjuk sama tuan.
>
> S: Di mana kamu simpan serbuk dadah tersebut?
>
> J: Di dalam 'Washing Machine' bahagian bawah yang telah saya buka dan simpan dadah di bahagian motor 'Washing Machine' tersebut. Lepas itu saya tutup semula.
>
> S: Boleh kamu tunjukkan kepada saya?
>
> J: Boleh.
>
> t.t. SP5 t.t. OKT
> 20.8.08 - 8.50 pagi 680425-06-5267

Accordingly a police report was lodged *vide* Jasin Report No. 2084/08, P 62. Thereafter, SP5 led by the accused proceeded to Kulim. At about 6.30 pm they arrived at a terrace house No. 9, Lorong Impian Murni, Taman Impian Murni, Bukit Mertajam, Pulau Pinang.

As there was no occupant in the house, SP5's men had lifted an iron grille of its railing and kicked open the front door of the house. Having gained entry, SP5 had questioned the accused. The accused responded. The questions and answers were again written by SP5 on a piece of paper, P61 as follows:

S: Di manakah kamu simpan serbuk dadah tersebut?

J: Di dalam 'Washing Machine' yang SAYA masukkan di bahagian bawah 'Washing Machine' yang terletak di bahagian dapur di hadapan bilik mandi.

S: Bolehkah kamu tunjuk dan ambilkan serbuk dadah tersebut?

J: Boleh.

Nota:

SUBJEK dengan diiringi oleh SAYA telah masuk ke dalam rumah dan SUBJEK telah mengambil satu bungkusan kain warna hitam dari bawah washing machine dan menyerahkan kepada SAYA.

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S: Adakah kamu tahu apakah barang dalam bungkusan kain warna hitam yang diserahkan kepada SAYA?

J: Dadah.

S: Adakah kamu pasti ini dadah?

J: Ya.

t.t. SP5 t.t. OKT 680425-06-5267

The accused then led SP5 to a kitchen area where he walked up to a washing machine. The accused turned the washing machine on its side on the floor. He removed a black cover from underneath the washing machine and took out a black canvas bag of 'BMW' brand. The said black canvas bag was handed over to SP5. Upon examination of the said canvas bag, SP5 found the followings - ...

[36] It must be noted that (i) the evidence adduced and admitted above exceeds the scope of s. 27 of the EA 1950. (see *PP v. Norzilan Yaacob & Anor* [1989] 1 CLJ 466; [1989] 2 CLJ (Rep) 345; [1989] 1 MLJ 442; *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 AMR 202); (ii) breaches confession rules; (iii) breaches the safe guard provided under s. 37A of the DDA 1952; (iv) breaches the rule of custody and control; (v) save for the incriminating evidence adduced by the prosecution in breach of all protection given to the accused there was no nexus shown by the prosecution to link the accused to the drugs. For example, keys to the house, etc. In short the conduct of the prosecution, inclusive of arrest, investigation, recovery, production of exhibits and failure to explain the discrepancies in weight as complained by the appellant taken as a whole was highly prejudicial to the accused and impinge on the fairness rule.

[37] In addition, the learned Deputy Public Prosecutor was magnanimous to concede in relation to the appellant's argument that there was a break in chain in evidence to say "no proper custody and control of the exhibits in Bilik Gerakan – Seberang Prai.

[38] The petition of appeal of the appellant is confined to two issues *inter alia* as to (i) exhibit; and (ii) section 27 of the EA 1950. The said petition in essence states as follows:

> There was discrepancy in weight thus raised doubts as to the identity of the exhibit. The learned judge erred in relying on section 27 of the Evidence Act 1950.

Prosecution Case

[39] It is clear from the judgment that the learned trial judge had heavily relied on s. 27 of the EA 1950 to call for defence. That part of the judgment at p. 31 reads as follows:

> The foundation of the prosecution's case is rested on the evidence of information supplied by the accused which is admissible under s. 27 of the Evidence Act, 1950.

[40] The learned judge had taken great pains to go through the jurisprudence of s. 27 of the EA 1950 in great detail citing some cases and not considering cases such as *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350; *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507; which on the factual matrix of the case will be favourable to the appellant to deny the

prosecution a *prima facie* case not only on the law but also the fact relating to admission of prejudicial evidence which will favour the defence on the application of maximum evaluation test as propounded in *Balachandran v. PP* [2005] 1 CLJ 85. (See *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[41] The learned trial judge heavily relied on *PP v. Hashim Hanafi* [2003] 8 CLJ 555; [2002] 4 MLJ 176 which did not consider the Federal Court case of *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350, and which has not been overruled by *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507 in the right perspective more so when s. 17(2) of the EA 1950 was not considered at all. In addition, the learned trial judge failed to appreciate that the decision of Augustine Paul J (as he then was) in *Hashim*'s case if applied to the facts of the instant case will be in favour of the appellant. The learned judge in *Hashim*'s case had held:

> (1) It is clear beyond doubt that the information given by an accused under s. 27 need not be in the actual words used though a written record is desirable. This is justified on the ground that s. 27 uses the word 'information' and not the word 'statement' which is used in ss. 17-31 of the Act (see pp 185A). Information given under s. 27 is not a matter that is required by law to be in writing so as to be governed by ss. 91 and 92 of the Act; *Sum Kum Seng v. Public Prosecutor* [1981] 1 MLJ 244 followed. The absence of a written record cannot affect the admissibility of the oral evidence of the information. It is desirable to have such a record (see p 185I-186A, E); *Hasamuddin bin Talena v. Public Prosecutor* [2002] 2 MLJ 408 distinguished.
>
> (2) It follows that the information that is admissible must relate distinctly to the fact discovered (see p 187D). Thus, the information that caused the discovery of the dangerous drugs was the information that the accused supplied to PW4 at the scene. It was the questioning of the accused by PW4 at the scene that led to the pointing out of the dangerous drugs. What was therefore of relevance was only the admissibility of this information. The fact that PW4 had prior information will not vitiate the admissibility of the information (see p 189F-G).
>
> (3) The question that PW4 asked the accused at the scene was whether he had any incriminating articles in his custody and control. The response of the accused was his act of pointing out exh P17 to PW4 by signs. That act was merely a

response to the question that was asked and not a direct answer to it. It did not mean that he agreed with the question. In any event, the expressions used in the question were the very elements that must be proved as prescribed by statute. They were technical and cannot be easily understood. They appeared to have been designed to give evidentiary value and weight to the answer given. Thus they cannot be read with the response of the accused. In such circumstances, the resultant statement was inadmissible (see p 191A-C).

(4) Evidence of the act of pointing out the dangerous drugs by the accused on its own was of little value. It will, at the highest, only show that the accused had knowledge that dangerous drugs were kept in exh 17 but such knowledge itself did not constitute possession. It was only one of the elements required to establish possession. Additional evidence was required to link the accused with the dangerous drugs recovered which was absent (see p 191H-I).

[42] In essence even if s. 27 of the EA 1950 is applicable and the information is made admissible without going through the *voire dire* process as impliedly required under s. 37A of the DDA 1952, the prosecution in the instant case had exceeded the scope of s. 27 EA 1950 and the statements of the accused to SP5 should have gone through the process of *voire dire*. In addition, even if *voire dire* has not been acted upon the court should have excluded the evidence as highly prejudicial and excluded the same limited to the discovery only. That is to say 'from the information given by the accused the drug was recovered' and nothing more to incriminate the accused on the issue of custody and control of the drugs which are essential elements of trafficking.

[43] In *Pulukuri Kottaya v. R* AIR (1947) PC 67 several accused persons were arrested and prosecuted for rioting and murder. One of them made a statement to the police that he and others armed themselves with sticks and spears and attacked the people in the opposite group and that the sticks and spears were kept concealed in a haystack. As a result of this information the police found the sticks and spears in the haystack. Relying on *Athappa Goundan v. Emperor*, the High Court admitted the entire statement and convicted them. On appeal the Privy Council pointed out the error committed by the High Court in having admitted the entire statement. The Privy Council stated that only that part of the information which stated that the sticks and spears were kept

A concealed in a haystack should have been admitted under s. 27 as only that part related distinctly to the fact discovered. The Privy Council observed:

> It is fallacious to treat the fact discovered within the section as
B equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. *Information as to past user or past history of the object produced is not related to its discovery in the setting in which is discovered.* Information supplied by a person in custody that 'I will
C produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that knife is concealed in the house of the informant to his knowledge and if the knife is proved to have been used in the commission of the offence, the
D fact discovered is very relevant. *But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.* (emphasis added)

[44] If not for the confession statements, custody and control of
E the drugs would not have been established at the prosecution stage. On the above issues alone the appeal must be allowed.

[45] Section 27 of the EA 1950 is not a passport to the admissibility of confession statement. It is only limited to the
F admissibility of information and subsequent discovery. Further, s. 27 of the EA 1950 also cannot be used to justify the police attempting to turn an ordinary 'recovery' to 'discovery'. Discovery under s. 27 may relate to knowledge but if the purpose of the prosecution by the assistance of s. 27 is to show 'culpable
G knowledge' then s. 17(2) will be attracted and *voire dire* must be conducted. (see *PP v. Liew Sam Seong* [1981] 1 LNS 159; [1982] 1 MLJ 223). The learned authors of *Rom's Criminal Ready Referencer*, vol. 2, at p. 1220 on s. 27 has this to say:

> Section 27 acts as a proviso only to secs. 25 and 26 and not to
H sec. 24 - *Pandurang v. State* (2002) 2 SCC 490: AIR 2002 SC 733:2002 Cr LJ 1007; *Budhraj v. State* AIR 2002 SC 3164: (2002) 8 SCC 45; *Bijay Kumar v. State of H.P.* 1978 Cr LJ 1619: 1978 Sim LC 284 (HP). Sec. 27 is in the nature of a proviso to sec. 26 - *Udai Bhan v. State of U.P.* AIR 1962 SC 1116: (1962)
I 2 Cr LJ 251.

The section is based on the principle that if the fact is discovered it furnishes some guarantee that the information was true - *Ram Kishan v. State of Bombay* AIR 1955 SC 104: 1955 Cr LJ 196; *Kottaya v. Emperor* AIR 1947 PC 67:48 Cr LJ 533.

Sec. 27 must be strictly construed - *Rajanikant v. State* AIR 1967 Goa 21, 30 (FB).

While accused points out the place where a dead body or an incriminating material was concealed only without stating that it was concealed by him three possibilities may occur. He himself concealed or he found another to conceal or some one told him about it. If the accused fails to tell the court about the last two possibilities presumption is that the accused had concealed - *State v Suresh* (2000) 1 SCC 471.

The basic idea embedded in sec. 27 is the doctrine of confirmation by subsequent events. The statement of information leading to discovery is only admissible. The statement has to be proved. Information should be recorded and if not so recorded the exact information must be adduced through evidence. The discovery on the basis of information is a guarantee that the information is true. Information may be confessional or non-inculpatory. But if it results in discovery of a fact it becomes a reliable information - *Bodhraj v. State* (2002) 8 SCC 45: AIR 2002 SC 3164; *State v. David Rozario* (2002) 7 SCC 728; see *State v. Damu* (2000) 6 SCC 269: AIR 2000 SC 1691.

[46] On the issue of break in chain of evidence relating to exhibits and discrepancies in weight and the fact that it was not explained, we are satisfied that the appellant had made out a case for acquittal both at the prosecution as well as the defence stage. (see *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383; *Natcha Dabkaew v. PP* (K-05-177-07-2012)).

[47] The position in India is that s. 27 alone cannot be a basis for conviction and in consequence the issue of voluntariness and its criteria is not given much prominence. Thus, s. 27 evidence in India at the most will show some nexus to the charge or stand as circumstantial evidence or can be relevant to 'knowledge' but that knowledge is not sufficient to attach criminal liability on the offence charged. The Federal Court in the recent case of *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630 (which has some relevance to the facts of our case) had the opportunity to revisit s. 27 and held:

(1) Information admissible under s. 27 of the Act included an accused's statement, or his act or conduct such as pointing out which led distinctly to the discovery of a fact. For such information to be admissible, there was no duty on the prosecution to prove voluntariness of the information. Although there was no evidence to show that Siew had given any statement to PW6 when asked where the key was, Siew pointed to the bunch of keys at a location that one would not be able to see it if one was entering the bathroom. In other words, if Siew had not pointed it to PW6, the latter would not be able to retrieve the keys. Siew's act of pointing amounted to information, and that information related distinctly to the discovery of a fact and was admissible under s. 27 of the Act. The fact discovered embraced the place where the bunch of eight keys was kept and Siew's knowledge as to that. The evidence of Siew leading PW6 and the police team to the first house and pointing to the place where the keys were found, and later pointing out the place where the key to the safe was found would also be relevant and admissible as conduct under s. 8 of the Act (see para 28).

(2) Each of the circumstantial evidence, taken by itself, was insufficient to bring home the charge against Siew. However, it was the combined effect of the several strands of circumstantial evidence which must be considered by the court. Siew was so situated to the proscribed drugs found in the rooms in the first house that he had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances were such that he may be presumed to intend to do so in case of need. Furthermore, as a tenant, Siew was in possession of the keys to the first house which he carried with him in his sling bag. PW6 managed to unlock the gate and the grille using one of the keys found in Siew's possession and there was nobody in the house. The room was locked and a bunch of keys was pointed to PW6 by Siew. The keys were concealed from view, but Siew knew where it was hidden. Siew also knew where the safe key was hidden.

(3) There was nothing in the judgment of the learned trial judge to show that she had acted on the impugned information in arriving at her decision to find Siew guilty of the trafficking charge. Similarly, there was nothing in the judgment of the Court of Appeal to show that it had acted on the impugned information in upholding the decision of the High Court.

[48] In essence if the 'information' was not the basis for conviction then the appellate position appears to be that it is a safe decision. In *Siew Yoke Keong*'s case, the Federal Court did not consider the case of *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350 or *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507 or s. 17 of the EA 1950 and s. 17 of the IA. However, the court agreed that 'information' and 'statement' is not synonymous. The Federal Court on this issue through Ahmad Maarop FCJ had this to say:

> [22] It is very important to note that **s. 27** of the **Evidence Act** uses 'information' instead of 'statement'. Information cannot be used as synonymous with statement. Information connotes two things - (a) a statement or other means employed for imparting knowledge possessed by one person to another, and (b) the knowledge so derived by the other person. Explaining this in *Karam Din v. Emperor* AIR 1929 Lahore 338 Dalip Singh J said:
>
> > In connexion with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. It is unnecessary to enter into the question whether all means of imparting knowledge by one person to another person are or are not covered by the word 'statement' but it is necessary to emphasise the second portion, namely, that 'information' also includes the knowledge derived by the person informed from the informant. To me, therefore, it seems clear that when a person deposes simply to the following effect, namely, that from information received from the accused he proceeded to do certain things and discovered certain other things, this statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that the word 'information'

A includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge. (emphasis added)

Defence Case

B **[49]** The learned trial judge had summarised the defence at pp. 50 to 52 of the appeal record as follows:

1. The accused was arrested in Jasin, Melaka.

2. The accused knew a Chinese lady named Cindy who hailed C from Kulim. He did not know her real name. Neither he knew a person called Low Pei Sew.

3. Cindy had a boy friend called Rocky @ Farouk who was a police officer attached at IPK, Johor.

D 4. When he was interrogated by several police officers at IPD Jasin, a Chinese police officer had acted as an interpreter as he was not conversant in Bahasa Malaysia.

5. During the journey to Kulim or Bukit Mertajam (to recover E the drugs), his hands were handcuffed at the back.

6. He denied leading the police to the house in Bukit Mertajam where the drugs were found.

7. He denied having given any statement or information to the F police.

8. In answer to the question in P60, "Di manakah kamu simpan serbuk dadah tersebut?", the accused denied the answer "Di dalam 'washing machine' bahagian bawah yang telah saya buka dan simpan dadah di bahagian motor G 'washing machine' tersebut. Lepas itu saya tutup semula" was his answer.

9. The question in P61 "Di manakah kamu simpan serbuk dadah tersebut?", the accused also denied the answer "Di dalam 'washing machine' yang saya masukkan dari bahagian H bawah 'washing machine' yang terletak di bahagian dapur di hadapan bilik mandi" was his answer.

10. Though the signatures in P60 and P61 were his, he could not remember when he signed them. He appended the signatures upon being asked to do so by the police and that I time he was tired and craving for drugs.

11. The accused did not take the police to the house in Bukit Mertajam. He denied pointing to the house where the drugs were subsequently recovered.

12. He denied leading C/Inspector Kamaroszaman, SP5 to the washing machine at the kitchen area in front of the bathroom and turned the said washing machine on its side on the floor.

13. He also denied removing a black cover from the bottom of the said washing machine, put both of his hands into the opening and retrieved a canvas bag and handed it to SP5. His hands were handcuffed at the back.

[50] Whether in the application of s. 27 of the EA 1950, voluntariness must be tested for cases in Malaya and Sabah, we leave it to the Federal Court for appropriate ruling in future cases as it involves art. 5(1) of the Federal Constitution and interpretation of s. 17 of the EA 1950, which has not been considered judicially yet. (see article by Hamid Sultan bin Abu Backer in *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350: A Classic Display of Judicial Vigilance). And also the jurisprudence relating to *generalibus specialia non-derogant.*

[51] Taking the defence as a whole and contrasting with the prosecution case and evidence, which had in fact no nexus to the accused as well as the issue of custody or control inclusive of issues relating to break in chain as well as weight of exhibits, it is difficult to see how a case for trafficking could have been made out by the prosecution at the prosecution stage as well as the defence case. (See *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2013] 4 CLJ 949).

[52] We are of the considered view that is unsafe to convict. In consequence the conviction and sentence is quashed and the appellant is acquitted and discharged.

We hereby order so.